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| <p>3 No. 488
 The People &c., Respondent,
 v.
 Wayne T. Nelson, Appellant.</p> | <p>Order reversed, judgment of conviction and plea vacated, motion to suppress granted and case remitted to Albany County Court for further proceedings on the indictment for reasons stated in the dissenting memorandum of Justice Ann T. Mikoll at the Appellate Division (83 AD2d 689-690). Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.</p> |
| <p>4 No. 482
 The People &c., Respondent,
 v.
 Angelo Nuccie, Appellant.</p> | <p>Order affirmed in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.</p> |
| <p>2 No. 475
 The People &c., Respondent,
 v.
 Eric Parker, Respondent.</p> | <p>Order affirmed for reasons stated in the opinion by former Justice James D. Hopkins at the Appellate Division (82 AD2d 661). Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.</p> |
| <p>4 No. 483
 The People &c., Respondent,
 v.
 Vicki Parker, Appellant.</p> | <p>Order reversed and a new trial ordered. Opinion by Judge Wachtler. Chief Judge Cooke and Judges Jasen, Jones, Fuchsberg and Meyer concur. Judge Gabrielli took no part.</p> |
| <p>1 No. 490
 The People &c., Respondent,
 v.
 Michael Rooney, Appellant.</p> | <p>Order affirmed in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.</p> |
| <p>AppT No. 474
 The People &c., Respondent,
 v.
 ?????????, Appellant.</p> | <p>Order reversed and a new trial ordered in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.</p> |

Remittitur

**Court of Appeals
State of New York**

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

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No. 488

The People &c.,

Respondent,

v.

Wayne T. Nelson,

Appellant.

The appellant(x) in the above entitled appeal appeared by Ungerman and Ackerman; the respondent(x) appeared by Sol Greenberg, District Attorney, Albany County.

The Court, after due deliberation, orders and adjudges that the order is reversed, judgment of conviction and plea vacated, motion to suppress granted and case remitted to Albany County Court for further proceedings on the indictment for reasons stated in the dissenting memorandum of Justice Ann T. Mikoll at the Appellate Division (83 AD2d 689-690). Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer concur. Judge Gabrielli took no part.

STATE OF NEW YORK
COUNTY OF ALBANY CLERK'S OFFICE } ss.:

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy Remittitur with the original thereof

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filed in this office on the 8 day of Oct 1982 and that the same is a correct transcript therefrom, and of the whole of said original.

**IN TESTIMONY WHEREOF, I have hereunto set my name
and affixed my official seal, this 26 day of Oct 1982**

/s/ GUY D. PAQUIN,
Clerk

(SEAL)

MEMORANDA, Third Dept., July, 1981

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* * * court in deference to New York authorities, and the majority's gratuitous remark to that effect is both unnecessary and inappropriate to its resolution of this appeal.

2 THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, v WAYNE T. NELSON, Appellant. — Appeal from a judgment of the County Court of Albany County (Clyne, J.), rendered December 4, 1979, convicting defendant upon his plea of guilty of the crime of criminal possession of a controlled substance in the third degree. Judgment affirmed. No opinion. Kane, J.P., Main, Casey and Yesawich, Jr., JJ., concur; Mikoll, J., dissents and votes to reverse in the following memorandum.

Mikoll, J. (dissenting). I respectfully dissent. At about 8:00 P.M. on March 21, 1979, defendant was observed walking in a northerly direction along the west side of Morningside Drive in Guilderland. It was a cold night. The street was unlighted and visibility, according to Trooper Guiry, was very difficult. The troopers, proceeding in the same direction in an unmarked police vehicle, observed defendant from the rear and from the east side of the street. He wore a corduroy coat. The troopers noted that defendant walked in a hunched manner, the shoulders of his jacket raised up and his chin buried within. There were bulges on both sides of the jacket underneath the arms. The troopers pulled across the street alongside defendant and Trooper Guiry shined a spotlight on the ground and said, "Hi, how are you? What is your name?" Defendant identified himself and looked up and down the street. The trooper exited the vehicle, shined a flashlight on defendant, asked for more identification and, thereupon, noticed a plastic bag containing vegetation protruding from defendant's left chest pocket. The trooper told defendant to empty his pocket. Defendant refused to do so whereupon the trooper told him he was under arrest and physically subdued him when defendant attempted to resist the search. Three other plastic bags with vegetation were seized

from his person and, upon a subsequent search, a foil wrapper containing pink pills was found. The trial court denied defendant's motion to suppress the fruits of the search. In its decision, the court held that the trooper was justified in making the initial stop and inquiry of defendant and, upon observing a bag containing green vegetation, was justified in ordering defendant to empty his pockets. The court concluded that defendant's refusal to do so justified the trooper's subsequent action of physically overcoming defendant's resistance to the search. In support of its decision, the court cited *People v Corrado* (22 NY2d 308). It is revealing to note that there the Court of Appeals reversed the conviction of the defendant where police, acting on a tip from an undercover police officer that marihuana would be passed at a given time and location, set up a stakeout. The police viewed an exchange of manila envelopes between two cars at the given location and time. The court held that the forcible stop of defendant's car and its search were unjustified since the circumstances did not entitle the police to draw an inference of criminality. The *Corrado* case lends no support to the decision of the trial court but leads rather to the contrary conclusion that the innocuous circumstances of the instant case did not justify the stop and search of the defendant. In an incisive pronouncement on the question of an officer's right to make inquiry of private citizens for information in the absence of any concrete indication of criminality, the Court of Appeals in *People v. De Bour* (40 NY2d 210) stated that there must be some articulable reason sufficient to justify the police action which was undertaken. When police officers are engaged in their criminal law enforcement function, their ability to approach people is circumscribed by the manner and intensity of the interference, the gravity of the crime involved and the circumstances attending the encounter. Thus, to be considered first is the question of whether or not the

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police action was justified in its inception and, secondly, whether or not that action was reasonably related in scope to the circumstances which render its initiation permissible. The police may not justify a stop by subsequently acquired suspicion resulting from the stop. In the instant case, there was nothing to arouse police interest in the defendant. There was no reported criminal activity afoot, the area was not one of high incidence of crime, the hour was early and defendant's walk and manner of dress were entirely normal and appropriate for a brisk March night. The bulge under defendant's arms was an insignificant circumstance. I conclude that the police had no reason to stop defendant. The subsequent sighting of contraband by the officer which obviously justified his hunch or suspicion of the defendant cannot be used as the exoneration for the initial illegal stop (*People v Howard*, 50 NY2d 583). The motion to suppress should be granted.

STATE OF NEW YORK
COUNTY COURT

COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK

against

WAYNE NELSON,

Defendant.

APPEARANCES:

For the People:
HON. SOL GREENBERG
District Attorney
County Court House
Albany, New York 12207

OF COUNSEL:

JOSEPH DONNELLY
Assistant District Attorney

For the Defendant:
F. STANTON ACKERMAN, ESQ.
100 State Street
Albany, New York 12207

CLYNE, J. This is a motion by the defendant to suppress certain tangible property.

On March 21, 1979 at about 8:00 P.M. Trooper Guiry, a uniformed New York State Police Officer, was cruising north-bound on Morningside Drive, a residential area in the Town of Guilderland in an unmarked police vehicle, and accompanied by Trooper Bare, when he observed the defendant walking in a northerly direction on the west side of the roadway in a hunched position. The defendant had a brown corduroy coat on with the shoulders up in the air, his head down, with his chin buried in his chest and there were bulges on both sides of the jacket underneath the arms. There were no street lights on the street and visibility was poor. The officer put on the high beams of the vehicle and pulled alongside the defendant. Trooper

Guiry threw the spotlight on the ground and stated to defendant, "Hi, how are you". The trooper then stated, "What is your name?" Defendant turned toward the officer and stated "My name is Wayne Nelson" and started looking up and down the street. Trooper Guiry exited the vehicle and threw the beam of his flashlight on the defendant and asked for I.D. As he put the light onto the defendant he noticed a large plastic bag containing green vegetation protruding from defendant's left chest pocket. The officer asked defendant to empty his pocket on the hood of the car. Defendant refused. Trooper Guiry stated that he was under arrest, a struggle ensued. Defendant was handcuffed and a search of his body revealed three more plastic bags containing a quantity of green vegetation. The plastic bags and contents were received in evidence at the hearing and the court takes note of the size and shape of the bags. In brief, they were not small. A further search at police headquarters revealed additional matter.

The foregoing constitutes findings of fact.

It is the court's conclusion of law that under the circumstances set forth above the officer was justified in making the initial inquiry and upon observing a bag containing green vegetation protruding from defendant's pocket was justified in requesting defendant empty his pockets (*People v. Corrado*, 22 NY2d 308). Defendant's refusal justified the trooper's subsequent action and the search and seizure of the property sought to be suppressed. Accordingly, the motion to suppress is denied.

This constitutes the decision and order of this court.

Dated: Albany, New York
November 12, 1979

/s/ JOHN J. CLYNE
Albany County Judge